

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 2:14-CV-8063-SDW

SPECIALIZED LOAN SERVICING, : TRANSCRIPT OF PROCEEDINGS
LLC, :
Appellee : MOTION
: :
-vs- :
: :
GORDON ALLEN WASHINGTON, : Pages 1 - 19
Appellants :
- - - - -

Newark, New Jersey
June 18, 2015

B E F O R E: HONORABLE SUSAN D. WIGENTON,
UNITED STATES DISTRICT JUDGE

APPPEARANCES:

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-and-
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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Certified Court Reporter
973-477-9704

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1 THE COURT: All right. This is the matter of
2 Washington versus Specialized Loans Servicing, LLC. It's civil
3 action 14-8063.

4 Counsel, you may enter your appearances, please.

5 MS. AMICA-TERRA: Good morning, your Honor. Rosa
6 Amica-Terra, from the law offices of Charles Gruen, on behalf
7 of Gordon Allen Washington.

8 THE COURT: Okay, good morning.

9 MR. NEALY: Water D. Nealy of the offices of
10 Walter D. Nealy, PC on behalf of Allen Washington. I
11 represented him as a debtor in the bankruptcy court.

12 THE COURT: Counsel, spell your name for me. I
13 don't see it on this lovely sign-in sheet, so I just want to
14 that we have you.

15 MR. NEALY: N-E-A-L-Y.

16 THE COURT: M-E?

17 MR. NEALY: No, Nas and in Nancy, E-A-L-Y.

18 THE COURT: Gotcha, very well.

19 MR. RIVERA-SOTO: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. RIVERA-SOTO: Roberto Rivera-Soto and

22 Christopher Tomlin of Ballard Spahr, a

23 both SLS and Bank of New York Mellon.

24 THE COURT: Very well. It's good to have all of
25 you. Everyone, you can have a seat for a second.

1 This is a request for appellate review as it
2 relates to a bankruptcy decision that was issued by Judge
3 Kaplan in this matter, that opinion having been -- resulted
4 from, I should say, a hearing that took place on September
5 30th, 2014. And I believe that this opinion was entered on
6 November 5th, 2014, or somewhere certainly thereabouts

7 So with that being said, I have read all the
8 submissions that have been provided to the Court. I did not
9 bring out the numerous submissions with me now, but I did want
10 to give counsel an opportunity to be heard orally, which is why
11 we scheduled today's hearing.

12 So former Justice Roberto Rivera-Soto, if you wish
13 to be heard, I'll hear from you first and then I'll hear from
14 counsel on the other side.

15 MR. RIVERA-SOTO: Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. RIVERA-SOTO: Your Honor, the issue on appeal
18 is really fairly straight forward. It's what statute of
19 limitations applies?

20 Judge Kaplan was confronted with what he thought
21 was a distasteful, unpleasant task and somehow he went off the
22 rails in doing so. The fact of the matter is that the statute
23 that is at issue here, which is 2A:50-56.1, is a specific
24 attempt by the New Jersey legislature to codify the statute of
25 limitations that would apply in a foreclosure action. And it

created three separate categories. In Subsection A, it basically said: If you're going to do an action on the note, then you must do it within six years of the maturity date that's on the note, not some maturity date that you can figure out from someplace else, by the maturity date that's on the note, or that you can compute from the language on the note. So that if the note said that it was dated January 1, 1970, and it was for thirty years, then can you compute on the face of the note that it's January 1, 2000, thirty years later.

The second subcategory says: We have another grouping of those cases where you have a mortgage, and we're going to presume that mortgages are normally, and these are just residential mortgages, normally for a 30-year period and therefore we're going to give you 30 plus 6, six being the statute of limitations.

And then there's the last category, and the last category talks in terms of what you do, not on an action on the note, but on an action in forfeiture under the mortgage. And it specifically says that you have 20 days -- 20 years, I'm sorry, from the date of default.

Now, here, by sort of trying to put a square peg in a round hole, Judge Kaplan decided that really what applied was Subsection A. And that since more than six years had elapsed from what he viewed to be the accelerated maturity date, which you cannot tell from the face of the documents, but

1 he decided that maturity date also meant that, that therefore
2 the claim was time barred. That is clearly wrong, with all due
3 respect to Judge Kaplan, it's just wrong.

4 And as we've noted to the Court in the submission
5 that we made yesterday, there have been two cases in the
6 Superior Court that have addressed it, one from the Morris and
7 Sussex vicinage, that was issued by Judge Hansbury, who is the
8 presiding judge in equity out there, and he rejected Judge
9 Kaplan's analysis completely. And the second one was from
10 Judge Robert -- I believe it's Roberts, from Hudson County, and
11 she too rejected Judge Kaplan's reasoning completely. These
12 are both unpublished decisions that clearly are unpublished
13 because, as your Honor knows, trial court decisions in New
14 Jersey are not published until they satisfy the criteria of the
15 Committee on Opinions. And the Committee on Opinions will not
16 authorize the publication of a trial court decision while a
17 case is still pending. So those are not published but the
18 restrictions of New Jersey Rule 1:36-3 do not apply to this
19 Court. This Court can take them into account and can consider
20 them in making a determination.

21 But more importantly, those two decisions make
22 sense. If the construct that Judge Kaplan applied were in fact
23 correct, then Subsection C of the statute of limitations that
24 the legislature adopted specifically for mortgage foreclosure
25 actions, would become superfluous. It would never get there,

1 because you would also be barred under either A or B, but
2 principally A. Clearly the legislature adopted Subsection C
3 for a reason. And they told us why they did so. They did so
4 because they were reacting to an Appellate Division decision
5 that said: By the way, guys, there is no statute of
6 limitations in New Jersey for mortgage foreclosure. So what we
7 are going to borrow is the statute of limitations for adverse
8 possession. The legislature looked at that opinion and said:
9 The logic seems right, the times seem right, and we do need to
10 deal with this because the purpose of the mortgage -- of the
11 Fair Foreclosure Act is to ensure that we give homeowners every
12 possible chance to try to redeem their debts. Putting a
13 shorter time period on this will not get there. And we
14 certainly can't have the note holders being subject to events
15 that are outside of their control. Let me give you an example
16 of that.

17 When the mortgage foreclosure process hit in New
18 Jersey and the crisis occurred, the State of New Jersey
19 basically halted all mortgage foreclosure actions. Stopped
20 them. And a statewide analysis was done, handled by Judge
21 Jacobson in Mercer County, the now Assignment Judge there, and
22 rules were created in order to -- how they were to be handled.
23 But the delay was several years in duration.

24 If the analysis that Judge Kaplan adopted were in
25 fact the law, every single mortgage holder would be prejudiced

1 by that delay, yet it had nothing to do with anything that they
2 did. And that cannot be the law. It simply cannot.

3 So for all of those reasons, we respectfully
4 request that the Court reverse the determination of Judge
5 Kaplan and find that the claim that is being presented here by
6 SLS and Bank of New York Mellon goes under Subsection C and
7 therefore it is timely. Thank you, your Honor.

8 THE COURT: Thank you.

9 Alright, Miss Amica-Terra.

10 MS. AMICA-TERRA: Good morning, your Honor.

11 THE COURT: Good morning.

12 MS. AMICA-TERRA: Judge Kaplan used a holistic
13 approach in interpreting the Fair Foreclosure Statute of
14 Limitations as he's required to do when a Federal Court is
15 interpreting a New Jersey State. The Court first look at the
16 plain language of the statute, gave the legislatively chosen
17 words their generally accepted meanings. He looked at the
18 statute has a whole in relation to the statutory scheme. He
19 found that neither acceleration nor maturity was defined in the
20 Fair Foreclosure Act. Finding the language to be ambiguous, he
21 then referred to the legislative history, which he also found
22 limited in guidance as to whether the term "maturity date" in
23 the statute of limitations includes an accelerated maturity
24 date.

25 The legislative history refers to matching a

1 six-year statute of limitations on actions based upon contract.
2 However, the history did not specify whether it meant N.J.S.A.
3 2A:14-1, which is applies to contracts which is neutral on
4 acceleration or maturity, or whether the legislator was
5 referring to N.J.S.A. 12A:3-1(18), which applies to negotiable
6 instruments, and states that the statute of limitations does
7 apply to the accelerated due date. In light of the fact that a
8 mortgage is a negotiable instrument, Judge Kaplan's decision,
9 which applies the statute of limitations to the accelerated
10 maturity date, is not clearly erroneous in his attempt to
11 interpret an ambiguous statute.

12 The statute of limitations provides two distinct
13 dates from which to apply the six-year statute of limitations:
14 The date fixed for making the last payment, or the maturity
15 date. A date fixed is static, but a maturity date can be
16 advanced if the loan documents permit. In this case, the loan
17 documents did permit acceleration of the maturity date and the
18 lender opted to exercise that remedy.

19 The Fair Foreclosure Act also permits
20 acceleration. But similar to the loan documents, does not
21 require acceleration. It uses the term "may" rather than
22 "shall" and permits a foreclosing lender to only foreclose on
23 unpaid installments of principle and interest and still
24 maintain their in rem mortgage lien on the property.

25 These appellants using the terms contained within

1 the four corners of note and mortgage exercised their remedy of
2 accelerating the debt. And by doing so, accelerated the
3 maturity date. It was in their control as to whether to
4 accelerate.

5 Appellants conceded that the six-year statute of
6 limitations already expired on the note. Their statutory
7 interpretation would allow a lender to accelerate the debt and
8 then still have 20 years to commence foreclosure proceedings,
9 which we believe is contrary to the principles of judicial
10 economy and would reward the lender for failure to correct
11 deficient pleadings and reward them for sitting on their rights
12 for another 20 years.

13 The appellants' argument that Judge Kaplan's
14 decision renders Subsection C as superfluous or insignificant
15 is also flawed. Subsection C would still apply when a borrower
16 defaults and the lender takes no action, in accordance with the
17 concept of adverse possession. If a lender does not accelerate
18 the debt, it would still be afforded a 20-year statute of
19 limitations from the date of default. Again, there's no
20 obligation for the lender to accelerate the debt under the loan
21 documents or the Fair Foreclosure Act. It's a remedy that they
22 may opt. And although acceleration may be a standard in a
23 lending industry, it's not required.

24 With respect to the two cases that were submitted to
25 your Honor yesterday. It was our first opportunity to review

1 the cases too. We believe the case out of Morris County by the
2 decision written by Judge Hansbury, he specifically
3 distinguishes his case from this case. Also, those cases are
4 still -- they're still within the timeframe to appeal.

5 And if the Fair Foreclosure Act is meant to give
6 homeowners every opportunity to save their homes, if a lender
7 only foreclosed on outstanding principle or interest payment,
8 it would give the borrower more of an opportunity to foreclose
9 if the debt is not accelerated.

10 And although the state foreclosures were stayed
11 for a period of time, that stay was lifted and the complaint in
12 this particular case was not dismissed until almost a year
13 after the stay was lifted. So the lender did have ample
14 opportunity to continue with the original foreclosure filing.
15 In fact, they received more than 30-days notice that the
16 complaint would be dismissed if they did not take action.
17 Action was not taken and thus the complaint was dismissed.

18 THE COURT: So, because I notice the Bankruptcy
19 Court had a stay in this case until March 12. What was that
20 for?

21 MS. AMICA-TERRA: No, March 12 was the date of the
22 bankruptcy filing. So at that point they became stayed. But
23 the original complaint was dismissed in July of 2013. The
24 lender's counsel received notice, I believe it was May 25th,
25 that the foreclosure would be dismissed within 30 days if

1 action was not taken.

2 THE COURT: Okay.

3 Alright, I also have just received the cases. I
4 mean, I only saw them this morning, so I don't know at what
5 point yesterday they were filed, but I have not had a chance to
6 read them or digest them, so.

7 MR. RIVERA-SOTO: I understand that, your Honor.
8 If I can brief rebuttal?

9 THE COURT: Sure.

10 MR. RIVERA-SOTO: Let me address the points
11 counsel made, not necessarily in the order in which they were
12 made, but let me start actually with the last one. As a matter
13 of fact, what counsel was referring to was the dismissal of the
14 original foreclosure complaint in state court.

15 THE COURT: I see.

16 MR. RIVERA-SOTO: That happens administratively.

17 THE COURT: Right.

18 MR. RIVERA-SOTO: Okay. So there's no substantive
19 determination made in respect of that.

20 Now, counsel talked about the Fair Foreclosure Act's
21 purpose, which is to provide homeowners with every opportunity
22 possible to save their homes. We don't disagree with that.
23 But every opportunity possible to save their homes does not
24 translate into getting a windfall. And that's what they're
25 seeking here. Let's make sure we remember what this case is

1 about. This mortgage was taken out in February of 2007. The
2 first mortgage payment was due April 1st, 2007. This mortgage
3 went into default in July of 2007. It is now eight years later
4 and not one mortgage payment has been made in that period of
5 time. And this debtor wants this Court to ratify his behavior
6 and give him what should now be about a million dollars'
7 windfall.

8 THE COURT: Nine hundred I think at one point.

9 MR. RIVERA-SOTO: At one point. But by this point
10 if they added my fees, it should be better than a million.

11 THE COURT: But that's sort of what Judge Kaplan
12 talked about too. I mean, obviously the default occurs very
13 early once this loan is begun. I mean, payment is made in
14 April, payment is not made as of July, 2007. And the issue
15 becomes, nothing gets done. The mortgage gets accelerated, and
16 then nothing else is done, so.

17 MR. RIVERA-SOTO: Well, but the rationale that
18 under Gurds (ch) why -- what was done or was not done still
19 remains, and that is, the full understanding that you had 20
20 years within which to file a foreclosure action. So there was
21 no rush in doing it. Secondly, it was just as the mortgage
22 foreclosure crisis was hitting full stride. So even if you
23 filed a foreclosure, where are you going with it? Nothing was
24 happening. People were working with mortgagors. There were
25 programs that were instituted, like the Homeowner's

1 Modification Program, or HAMP or HARP, whatever those acronyms
2 stand for, that were all being done in order to try to address
3 what was something that was systematic. Was not unique or
4 idiosyncratic to any given lender or, in fact, any given
5 borrower. Because the reasons were as multiple as there were
6 people who were involved. But the fact of the matter is, that
7 everyone in their -- I wanted to say right mind, but that may
8 be a little too harsh, was of the view that you had 20 years
9 within which to file your mortgage foreclosure action. Because
10 the Appellate Division said it, and then the legislature in New
11 Jersey amended the Fair Foreclosure Act to provide for it.

12 Now, what's the alternative? And that's the part
13 that counsel did not talk about. What's the alternative? The
14 alternative then is that in July of 2007, when the first
15 default occurred, the bank could have sued for foreclosure and
16 said: You are in default for the month of July, 2007. And
17 then when he didn't pay in August, they'd have to amend the
18 complaint to say: Now you haven't paid in July and August of
19 2007. And when he didn't pay in September, they now have to
20 amend the complaint again to say: You haven't paid now in
21 July, August and September. The notion is ridiculous. The law
22 cannot provide --

23 THE COURT: If you look at it that way. But the
24 next argument is, why don't you follow it a year later, when
25 you don't have to do it each month, a year later?

1 MR. RIVERA-SOTO: Even if you filed it a year
2 later --

3 THE COURT: Two years later.

4 MR. RIVERA-SOTO: -- according to this theory, I
5 can only file for the months in which he was in default.
6 Because if I accelerated the loan, if I accelerated the loan
7 under debtor's theory, I now could no longer take advantage of
8 Subsection C, but I was now stuck under Subsection A, which
9 gives me six years instead of 20.

10 THE COURT: So --

11 MR. RIVER-SOTO: Because -- I'm sorry to
12 interrupt, your Honor.

13 THE COURT: Go ahead.

14 MR. RIVERA-SOTO: To close the thought. Because
15 under their theory, an accelerated maturity date is the same as
16 maturity date as defined in Subsection A of the statute. That
17 can not be.

Well, an accelerated date can never come from the

mortgage, note, bond or other obligation. It will always come -- excuse me, it will always come from some event extraneous to the note, bond, mortgage or other obligation. It will come because there's been a default. That will not appear from the four corners of the document that creates the obligation. So we clearly cannot be stuck to that because that can not be defined. And it is simply a bit of legal wizardry to say: Well, the maturity date was accelerated and therefore the maturity date is now the new accelerated maturity date.

Well, perhaps you could do that in the abstract.

But here you can't do it. Why? Because the legislature knew what acceleration meant. And if your Honor will note in our reply brief, starting at page 5, we give your Honor the examples within the four corners of the Fair Foreclosure Act where the legislature specifically spoke as to accelerated debts. It knew how to say it. And it did not say it here.

And the principle, I now start back at where

counsel started. The first thing that counsel told the Court was: This review has to be holistic because that's what Judge Kaplan did. I couldn't agree with her more. I would state the proposition a little bit differently. I would state that it is the obligation of the Court to read a statute so as to give meaning to all of its sections, not one to the preference of others. And if the statute is read as Judge Kaplan has proposed, then Subsection C is superfluous and unnecessary

1 because always Subsection A will trump. There's a reason for
2 Subsection C. And it is the Court's obligation to give it its
3 vibrancy and its relevance.

4 THE COURT: But you heard the example cited by
5 counsel as it relates to a circumstance under which Section C
6 would be applicable. What's your thought in that regard?

7 MR. RIVERA-SOTO: I don't think their example
8 makes a whole lot of sense. Because in my view, Section --
9 Subsection C applies any time you're talking about foreclosing
10 on the mortgage. Not an action on the note, but foreclosing on
11 a mortgage. So that, to a large degree, the note becomes
12 almost irrelevant. It's the right to secure the collateral
13 that is the issue under C, it's not the underlying obligation.

14 So when I hear counsel's explanation, my thought
15 is: You're mixing apples and oranges, because they do not
16 belong together. Subsection C talks about foreclosure on the
17 mortgage. Because, frankly, if you were to say: Well, what do
18 you do in respect to the note? In my view, Subsection A is
19 interesting, but in some degree unnecessary, because the UCC
20 provides for the statute of limitations on a negotiable
21 instrument, which is what a note is. And it says it's six
22 years.

23 All Subsection A does is import the UCC's statute
24 of limitations to this context. Which, by the way, is the New
25 Jersey general statute of limitations for breaches of contract,

1 which is, again, all a note is. It's a contract. But we view
2 mortgage foreclosure differently. We do not view mortgage
3 foreclosure as a breach of contract. We do not view mortgage
4 foreclosure as an obligation under a note. We view mortgage
5 foreclosure as collection on security for a debt, which is
6 different from the debt, itself. That's why we have two
7 instruments, a note and a mortgage. That's why the note is not
8 recorded but the mortgage is. And the reason for that is to
9 provide fair notice to anybody else of the underlying
10 obligation here. And that someone may stand in your title
11 chain. That's why. So to a large degree, it's an interesting
12 analogy, but it's irrelevant. Because what matters here is
13 that we're talking about a mortgage foreclosure, not an action
14 on the debt.

15 THE COURT: Alright, very well.

16 MR. RIVERA-SOTO: Thank you, your Honor.

17 THE COURT: Thank you.

18 Alright. And, Miss Amica-Terra, anything else you
19 want to add? You don't have to. I know lawyers are always
20 scared not to if they're asked.

21 MS. AMICA-TERRA: Just the last.

22 THE COURT: Because I did ask some questions, so I
23 want to make sure that there's nothing you wanted to add.

24 MS. AMICA-TERRA: Appellants argue that Subsection
25 A only apply to notes. There's already a statute that applies

1 to notes. And it wouldn't make sense if that statute only
2 applies to notes when it is part of the Fair Foreclosure Act.

3 And the legislative purpose of this statute of
4 limitations is to clear title on actions that can not be -- on
5 loans that can no longer be ensure forced.

6 This action was commenced in 2007. They
7 weren't -- these foreclosure matters were not stayed until, I
8 believe it was late 2010 or sometime in 2011. They were
9 notified of deficiencies in their final judgment -- motion for
10 final judgment of foreclosure as early as 2010, and never took
11 action to remediate.

12 Finally, a lender would always know when the
13 accelerated date is because the acceleration is in the control
14 of the lender and not of the debtor. So they would have the
15 information necessary to know that an action must be commenced
16 within six years from the date that they chose to accelerate
17 the debt.

18 Thank you, your Honor.

19 THE COURT: Alright, very well.

20 Alright. With that being said, counsel, thank
21 you. I will take it under advisement. I will issue an
22 opinion. It will give me an opportunity as well to read and
23 digest the persuasive authority that has been submitted as of
24 yesterday.

25 So, thank you, and you will hear from the Court.

1 MS. AMICA-TERRA: Thank you, your Honor.

2 MR. RIVERA-SOTO: Thank you, your Honor.

3 (Matter concluded)

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